3

No. 07-437

10-31-2007

IN THE

SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs

COREY RAMONE FRAZIER,

Respondent.

On Petition For Writ of Certiorari
To The Michigan Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Daniel D. Bremer (P-23554)
Attorney for Respondent
1133 East Bristol Road
Burton, Michigan 48529
(810) 232-6231

QUESTIONS PRESENTED FOR REVIEW

1. Should the United States Supreme Court grant certiorari from a decision of the Michigan Supreme Court arising from the trial court granting an interlocutory motion in limine in favor of the Defendant on an issue raised for the first time before the Michigan Supreme Court, that issue being whether the Defendants' convictions should be reinstated without a new trial?

2. Is this an appropriate case to review the application of the law of the case doctrine and *res judicata* doctrine with respect to *habeas corpus* decisions favorable to criminal defendants?

TABLE OF CONTENTS

Questions Presented for Review.....i

Table of Contents.....i

Table of Authorities.....ii

Citation to Opinions Below.....1

Jurisdiction.....1

Constitutional and Statutory Provisions Involved in the Case.....1

Statement of the Case.....2

Reasons for Denying the Writ.....4

Argument

I. THE SUPREME COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE IT SEEKS RELIEF SOUGHT FOR THE FIRST TIME FROM A DECISION.....5

II. THIS IS NOT AN APPROPRIATE CASE TO REVIEW THE APPLICATION OF THE LAW OF THE CASE DOCTRINE AND *RES JUDICATA* DOCTRINE WITH RESPECT TO *HABEAS CORPUS* DECISIONS FAVORABLE TO CRIMINAL DEFENDANTS..... 10

TABLE OF CONTENTS
(Continued)

Conclusion....14

TABLE OF AUTHORITIES

Cases

Arizona v *California*, 460 US 605; 75 L Ed 2d 318; 103 S Ct 1382 (1983)....12

Browder v *Illinois Dep't of Corrections*, 434 US 257; 54 L Ed 2d 521; 98 S Ct 556(1978)....11

Chambers v *Cox*, 400 US 870 (1970)....10, 11

Collins v *Loisel*, 262 US 426; 67 L Ed 1062; 43 S Ct 618;(1923)....10, 11

Dewey v *Des Moines*, 173 US 193-198 19; 43 L Ed 665; 19 S Ct 379 (1899)....9

Frazier v *Berghuis*, Docket No. 02-CV-71741DT (Aug. 6, 2003)....1, 2

Henry v *Mississipi*, 379 US 443; 13 L Ed 2d 408; 85 S Ct 564 (1965)....7

Illinois v *Gates*, 462 US 213; 76 L Ed 2d 527; 103 S Ct 2317 (1983)....8, 9

Kremer v *Chem. Constr. Corp.*, 456 US 461; 72 L Ed 2d 262; 102 S Ct 1883(1982)....11, 12

People v *Frazier*, 270 Mich App 172; 715 NW2d 341 (2006)....1

People v *Frazier*, 478 Mich 231; 733 NW2d 713 (2007)....1

People v *Frazier*, 478 Mich 1201; ___ NW2d ___ (2007)....1

Strickland v *Washington*, 466 US 668; 80 L Ed 2d 674; 104 S Ct 2052 (1984)....9

Taylor v *Illinois*, 484 US 400; 98 L Ed 2d 798; 108 S Ct 646(1992)....6

United States v *Cronic*, 466 US 657; 80 L Ed 2d 657; 104 S Ct 2039 (1984)....4, 9

United States v *Williams*, 504 US 36; 118 L. Ed. 2d 352; 112 S. Ct. 1735 (1992)....8

Virginia Military Institute v *United States*, 508 US 946; 124 L Ed 2d 651; 113 S Ct. 2431 (1993)....5

Statutes

MCL 750.227b.....1

MCL 750.316(1)(b).....1

MCL 750.529.....1

28 USC § 1257a.....1

8 USC § 2254.....2

Court Rules

S Ct Rule 10.....4

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Genesee County Prosecutor is seeking certiorari from a published decision of the Michigan Supreme Court, *People* v *Frazier*, 478 Mich 231; 733 NW2d 713 (2007), rehearing denied *People* v *Frazier*, 478 Mich 1201; ___ NW2d ___ (2007). This decision reversed in part a published decision of the Michigan Court of Appeals, *People* v *Frazier*, 270 Mich App 172; 715 NW2d 341 (2006). Also involved is a *habeas corpus* decision by the United States District Court for the Eastern District of Michigan, *Frazier* v *Berghuis*, Docket No. 02-CV-71741DT. All are set forth in full in the appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Genesee County Prosecutor seeks jurisdiction under 28 USC § 1257a. Since the decision of the Michigan Supreme Court does not in fact decide any federal question or affect the validity of any federal statute or decision of a federal court, Respondent does not believe that this Court has jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Respondent agrees with the Petitioner's position on the constitutional and statutory provisions involved in this case.

STATEMENT OF THE CASE

On January 29, 1996, the Defendant, Corey Frazier, was found guilty by a jury in Genesee County, Michigan of two counts of felony murder [MCL 750.316(1)(b)], two counts of felony firearm [MCL 750.227b], and armed robbery [MCL 750.529]. He was on March 5, 1996 sentenced to life imprisonment without parole for felony murder, two years for felony firearm and life for armed robbery.

The Michigan Court of Appeals vacated the armed robbery conviction as barred by double jeopardy but remanded the case to the trial court to determine whether statements made by Mr. Frazier to the police were the result of ineffective assistance of counsel. After the trial court determined that the statements were not the result of ineffective assistance of counsel, the Court of Appeals affirmed Mr. Frazier's remaining convictions on April 21, 2000, rejecting Mr. Frazier's contention that he had received ineffective assistance of counsel. The Michigan Supreme Court denied Mr. Frazier's application for leave to appeal on May 4, 2001.

Mr. Frazier contended that he had received ineffective assistance of counsel because, after his arraignment, his retained attorney had taken him to the police station, advised him to talk to the police and then left.

Mr. Frazier later filed a petition for a writ of habeas corpus pursuant to 28 USC § 2254 in the United States States District Court for the Eastern District of Michigan on May 2, 2002. On August 6, 2003, Judge Patrick J. Duggan issued an opinion and order conditionally granting the petition for writ of habeas corpus. [*Frazier* v *Berghuis*, Docket No. 02-CV-71741-DT, unpublished opinion issued August 6, 2003]. Judge Duggan held that Defendant had been deprived of

his right to counsel at a critical stage of the proceedings and was thus entitled to relief. Judge Duggan then said this:[1]

> In the case at bar, 'the taint' [of denial of counsel] did not occur during Petitioner's trial, but rather during the interrogations. The absence of counsel during the interrogations tainted the whole trial process, as evidenced by the use of Petitioner's statements at trial. Allowing the State to retry Petitioner with the use of the statements made during the tainted interrogations would lead only to another tainted trial. Therefore, the only appropriate remedy is to now allow use of the tainted statements, should the State decide to initiate a new trial in this matter.

This case was then reopened in Genesee County Circuit Court on September 18, 2003 and new counsel was appointed to represent Mr. Frazier. Mr. Frazier's new attorney filed a motion in limine to prevent the use of his statements for any purpose, including impeachment and the testimony of the two witnesses whose identity was learned through the statements. On July 28, 2004, the trial court granted this motion. The trial was scheduled to begin two days later, but when the trial judge refused to stay the proceedings for an interlocutory appeal, the prosecutor asked him to dismiss the case without prejudice. The trial judge granted this motion and the prosecutor then sought leave to appeal with the Michigan Court of Appeals.

The Court of Appeals then issued its opinion on March 7, 2006 as a published opinion. In this opinion, the Court of Appeals held by a two to one vote that the case should be remanded to the trial court for a hearing to determine whether the identity of Wilbert Mack and Anthony Wright would have been inevitably discovered through alternate means.[2] The majority reversed the trial court's refusal to allow the use of Mr. Frazier's statements for impeachment.[3] Judge Michael Talbot, the dissenting judge, concurred in reversing the trial judge's refusal to allow use

---

1 Appendix to Petition for Writ of Certiorari 96a.
2 Appendix to Petition for Writ of Certiorari 58a, 66a
3 Appendix to Petition for Writ of Certiorari 58a.

of the statements for impeachment, but he believed that there was no need for an evidentiary hearing concerning the inevitable discovery of the two witness and would have simply allowed the use of their testimony.[4]

On June 6, 2007, the Michigan Supreme Court reversed the Michigan Court of Appeals in part by holding that the exclusionary rule did not apply to the testimony of the street sweepers and by disapproving of the Michigan Court of Appeals endorsement of Judge Duggan's *Cronic* analysis.[5]

The Michigan Supreme Court refused to reinstate Mr. Frazier's convictions or allow the use of Mr. Frazier's statements as direct evidence as requested by the prosecutor, because the prosecutor had neither appealed the decision of Judge Duggan nor raised these issues before the trial court or Michigan Court of Appeals.[6]

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There are three aspects of the prosecutor's petition that stand out immediately: 1) the prosecutor is seeking certiorari from a decision of the Michigan Supreme Court affecting an interlocutory order entered by the trial court; 2) the prosecutor is seeking to raise an issue or issues that the prosecutor did not raise before the trial court or intermediate appellate court; 3) the prosecutor is attempting to collaterally attack a decision of a United States District Court entered on August 6, 2003 that was not appealed.

S Ct Rule 10(b) and (c) provide the criteria used by this Court for granting certiorari from the final decision of a state court:

---

4 Appendix to Petition for Writ of Certiorari 78a.
5 Appendix to Petition for Writ of Certiorari 29a-30a.
6 Appendix to Petition for Writ of Certiorari 9a-12a.

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Respondent intends to demonstrate that the Michigan Supreme Court has done neither of these things, and that in fact the Michigan Supreme Court explicitly declined to decide a federal question that was not before it.

ARGUMENT

I. THE SUPREME COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE IT SEEKS RELIEF SOUGHT FOR THE FIRST TIME FROM AN INTERLOCUTORY ORDER ENTERED BY THE TRIAL COURT

While the rules of this Court do not preclude granting certiorari from an interlocutory decision, Justice Scalia said this in an order denying a petition for writ of certiorari in *Virginia Military Institute* v *United States,* 508 US 946; 124 L Ed 2d 651; 113 S Ct. 2431 (1993):

> We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. See, *e. g., American Construction Co.* v. *Jacksonville, T & K. W. R. Co.*, 148 U.S. 372, 384, 37 L. Ed. 486, 13 S. Ct. 758 (1893); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R. Co.*, 389 U.S. 327, 328, 19 L. Ed. 2d 560, 88 S. Ct. 437 (1967) *(per curiam);* see generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224-226 (6th ed. 1986). I think it prudent to take that course here. Our action does not, of course, preclude VMI [Virginia Military Institute] from raising the same issues in a later petition, after final judgment has been rendered. See, *e.g., Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-259; 60 L. Ed. 629, 36 S. Ct. 269 (1916); *Hughes Tool Co.* v *Trans World Airlines, Inc.*, 409 U.S. 363, 365-366, 34 L Ed. 2d 577, 93 S. Ct. 647, n.1 (1973); Stern, Gressman, &

direct conflict with a decision by a United States District Court that had continuing jurisdiction to enforce its decision. Appendix to Petition for Writ of Certiorari 11a. While the prosecutor tells us that this reasoning is "unacceptable" on page 12 of the petition, such reasoning was compelled by posture of the case. Had the Michigan Supreme Court barred the trial court from retrying Mr. Frazier, the condition set forth in Judge Duggan's decision would become impossible and it is entirely possible that the writ would have become absolute.

The prosecutor cites *United States* v *Williams*, 504 US 36; 118 L Ed 2d 352; 112 S Ct 1735 (1992) as holding or at least suggesting that the "pressed or passed on" standard is subordinated to this Court's "broad discretion." What this case actually holds is that a case is suitable for certiorari if an issue has been considered by a federal intermediate appellate court even if the precise issue was not raised by a party in that court. *United States* v *Williams*, supra, 504 US 36, 43-44. In the present case, the Michigan Supreme Court explicitly refused to consider the question of reinstatement of Mr. Frazier's convictions. Furthermore, as the prosecutor acknowledges on page 5 of the petition, this Court in *United States* v *Williams*, supra, 504 US 36, 44 fn. 5 suggested that a stricter standard is appropriate for granting certiorari from a decision from a state court than from a federal court, because ". . . the absence of challenge to a seemingly settled federal rule deprives the state court of an opportunity to rest its decision on an adequate and independent state ground."

The "pressed or passed upon" rule for granting certiorari is set forth in some detail in *Illinois* v *Gates*, 462 US 213; 76 L Ed 2d 527; 103 S Ct 2317 (1983). In that case, the United Supreme Court held that the reliability of an informant's tip in supporting issuance of a search warrant should be governed by a "totality of circumstances" analysis. The State of Illinois in its

petition for writ of certiorari had also asked this Court to modify the exclusionary rule to allow admission of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment to the United States Constitution.

This Court after first granting certiorari with respect to the latter question explained in its decision that it was declining to rule on the exclusionary issue because this question had not been raised by the State of Illinois in the Illinois state court system. *Illinois* v *Gates*, supra, 462 US 213, 220-221 The Supreme Court explained further that ". . . we can see no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of a proponent of a federal claim to have raised that claim." *Illinois* v *Gates*, supra, 462 US 213, 221.

This Court followed an earlier case, *Dewey* v *Des Moines*, 173 US 193, 197-198; 43 L Ed 665; 19 S Ct 379 (1899), in distinguishing between enlargement of questions presented to the State court and entirely new questions, although this Court said that there was no clear-cut line between these two circumstances. *Illinois* v *Gates*, supra, 462 US 213, 220.

The issue that the prosecutor in the present case raised in his petition is not a mere enlargement of the issue considered by the Michigan Supreme Court; it is an entirely different issue. The prosecutor's petition frames the issue that he is raising as if it is related to the application of the correct standard of ineffective assistance of counsel to this case. The Michigan Supreme Court, however, agreed with the prosecutor that *Strickland* v *Washington*, 466 US 668; 80 L Ed 2d 674; 104 S Ct 2052 (1984) rather than *United States* v *Cronic*, 466 US 657; 80 L Ed 2d 657; 104 S Ct 2039 (1934) was the correct standard as applied to the present case. There is no issue here for this Court to decide. The issue that the prosecutor is asking this Court to decide is simply whether Mr. Frazier's convictions should have been reinstated without a new trial.

This is an entirely different issue from that decided by the Michigan Supreme Court which was whether the testimony of two witnesses mentioned in Mr. Frazier's statements should be allowed at Mr. Frazier's retrial.

II. THIS IS NOT AN APPROPRIATE CASE TO REVIEW THE APPLICATION OF THE LAW OF THE CASE DOCTRINE AND *RES JUDICATA* DOCTRINE WITH RESPECT TO *HABEAS CORPUS* DECISIONS FAVORABLE TO CRIMINAL DEFENDANTS

Res Judicata

As Justice Brennan said in dissenting from the denial of a petition for a writ of certiorari in *Chambers* v *Cox*, 400 US 870 (1970), the res judicata effect of a United States District Court decision granting habeas corpus is less settled than the res judicata effect of a decision denying habeas corpus. Justice Brennan believed that *Chambers* v *Cox* was an appropriate one to give some guidance on this question. What remains as binding precedent however, as acknowledged by Justice Brennan, is *Collins* v *Loisel*, 262 US 426, 430; 67 L Ed 1062; 43 S Ct 618 (1923) wherein Justice Brandeis said that ". . . the [habeas corpus] judgment is res judicata only that [the defendant] was at the time illegally in custody, and of the issues of law and fact necessarily involved in that result."

Chambers was a much more appropriate case than is the present one for resolving any uncertainty about the res judicata effect of a *habeas corpus* decision granting conditional release. In that case, a United States District Court had decided that there was no probable cause for the arrest of the petitioner and that therefore the narcotics seized from his person should have been excluded from evidence. When the State of Virginia retried the petitioner, the prosecutor was allowed to introduced additional evidence to show probable cause for the arrest. The narcotics

ly pursued an appeal through the New York state court system. The *Kremer* case held that because the employee's claim was adjudicated by the New York court system, the federal courts were bound by *res judicata* to honor New York's rejection of the claim, based on a very old federal law that required federal courts to extend full faith and credit to state court decisions. This Court did say, however, that there could be an exceptional situation where a party did not have a "full and fair opportunity" to adjudicate its position and that "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kremer* v *Chem. Constr. Corp.*, supra, 456 US 461, 480-481. That is clearly not the situation in the present case. The prosecutor's position is that because the Michigan Supreme Court disagreed with Judge Duggan's decision, the Michigan Supreme Court should not have considered Judge Duggan's decision to have *res judicata* effect. The authority cited by the prosecutor does not support that position.

Law of the Case.

The prosecutor cites several cases for the proposition that the law of the case doctrine allows a departure from the holding in that case if the original decision is clearly erroneous. This only applies, however, to the court that made the original decision; it does not mean that the Michigan Supreme Court may ignore the decision of the United States District Court because it is convinced that it is erroneous. In *Arizona* v *California*, 460 US 605, 618; 75 L Ed 2d 318; 103 S Ct 1382 (1983), this Court explained the context of the law of the case doctrine:

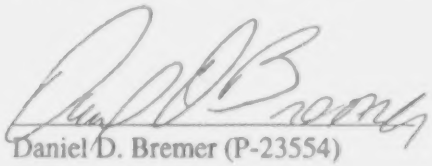
> Unlike the more precise requirements of *res judicata*, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. See 1 B. J. Moore & T. Currier, Moore's Federal Practice 0.404 (1982) (hereinafter Moore). fn. 8. Law of the case directs a court's discretion, it does not limit

CONCLUSION

The prosecutor concludes his petition by informing us that there should be no need for a retrial. In every case where a litigant seeks certiorari from an interlocutory decision, they undoubtedly inform this Court that a trial should not be necessary and that they should have immediate, interlocutory relief. Yet this Court will "generally await final judgment" and certainly should in this case. The opinion of the Michigan Supreme Court does not in any way decide any federal question. The Michigan Supreme Court explicitly refused to do so.

This Court should not, in any event, allow a collateral attack on a final decision of a United States District Court. The State of Michigan could certainly have instead appealed that decision. The State of Michigan would then have been in a position to file a petition for writ of certiorari with this Court the right way.

Respectfully submitted,



Dated: October 31, 2007

Daniel D. Bremer (P-23554)
Attorney for Respondent
1133 East Bristol Road
Burton, Michigan 48529
(810) 232-6231

Daniel D. Bremer
Attorney At Law

1133 E. Bristol Road
Burton, Michigan 48529
(810) 232-6231

October 31, 2007

Clerk, United States Supreme Court
Supreme Court of the United States
One First Street NE
Washington, DC 20543

Re: People of the State of Michigan vs Corey Ramone Frazier, No. 07-437

Dear sir or madam:

I am enclosing for filing ten copies of a Motion for Leave to Proceed *in Forma Pauperis*, ten copies of an Affidavit in Support of Motion for Leave to Proceed *in Forma Pauperis*, ten copies of a Brief in Opposition to Petition for a Writ of Certiorari, and Certificate of Service.

Sincerely,

Daniel D. Bremer

RECEIVED
NOV - 5 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-437

IN THE

SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs

COREY RAMONE FRAZIER,

Respondent.

CERTIFICATE OF SERVICE

I certify that all parties required to be served have been served and that I served a true copy a Motion for Leave to Proceed *In Forma Pauperis*, Declaration in Support of Motion for Leave to Proceed *In Forma Pauperis*, and of a Brief in Opposition to Petition for a Writ of Certiorari upon David S. Leyton, Genesee County Prosecuting Attorney, 900 South Saginaw Street, Flint, Michigan 48502 telephone number (810) 257-3854 by first class mail on October 31, 2007. This party is the party that Respondent is required to serve.

Dated: October 31, 2007

Daniel D. Bremer